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Supreme Court, U.S.
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No. 79-2000

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

STUART RICHARD COHEN, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RESTATEMENT OF QUESTION PRESENTED

Whether the Pennsylvania Supreme Court's granting of a new trial to petitioner was a sufficient remedy for alleged prosecutorial misconduct where allegations of such misconduct were either disputed, not established by the evidence, taken out of context, or, objected to only occasionally or in an untimely fashion, and, did not constitute such overreaching as would warrant dismissal of the charges under the due process and double jeopardy clauses.

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## REASONS WHY THE WRIT SHOULD BE DENIED

### I. The Record Below Does Not Establish The Egregious Prosecutorial Misconduct Petitioner Alleges.

The petitioner contends that the prosecution committed many acts of misconduct, including the alleged coercion of witnesses, interference with defense access to Commonwealth witnesses, and unfair argument and cross-examination at trial. He claims that the alleged prosecutorial errors were so egregious that the Pennsylvania Supreme Court's reversal of his conviction and the grant of a new trial is not sufficient remedy for these errors, that a complete discharge is warranted. The Commonwealth of Pennsylvania strongly disagrees.

To be sure, the Commonwealth here does not condone some of the prosecutor's language and conduct, but, the transcripts simply do not support petitioner's allegation of such egregious prosecutorial misconduct or

overreaching as would warrant a discharge. Further, petitioner's use of the conclusions of the prosecutor's successor in office, and, his use of — in the finest traditions of advocacy — descriptive adjectives and phraseology cannot change or enlarge what appears in the record below.

### A. Pre-trial conduct

In his petition, petitioner points to several sources of prosecutorial misconduct. To begin with he asserts that the District Attorney Robert Van Hoove, and his assistant, the trial prosecutor, John J. Murphy, Jr., had "elicited statements implicating Cohen by *threatening* witnesses with the electric chair and describing it and the smell of burning flesh to them in lurid detail. At least seven witnesses were subjected to this mode of questioning." (Petition, p. 4, emphasis supplied)[1] Petitioner relies on the testimony of Detective John Halstead, the police prosecutor in the case.

Detective Halstead's testimony, reviewed in substantive context, and without words being placed in his mouth by skillful trial counsel, was that the Commonwealth's witnesses were never threatened (Disq. Tr. 91, 92),[2] that they were advised of their constitutional rights, (R. 43a, Disq. Tr. 91, 92),[3] that their liberty was never restrained (Disq. Tr. 92), that they were informed

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[1] "Petition" refers to the Petition For a Writ of Certiorari filed by the counsel for Stuart Richard Cohen on June 18, 1980.

[2] "Disq. Tr." refers to the Transcipt of the Proceedings before the Honorable Frederick Edenharter, Judge of the Court of Common Pleas, Berks County, Pa., on Cohen's Pre-Trial Application to Disqualify the District Attorney, et al.

[3] "R" refers to the Reproduced Record filed in the Supreme Court of Penna.

that they could possibly be charged with 1st degree murder, (R. 43a, 50a), that the penalty for 1st degree murder was death in the electric chair or a life sentence. (R. 43a, Disq. Tr. 91, 92). While it is true that the electric chair was described to them, it must be noted that the Commonwealth's witnesses were less than savory; some were directly involved in the murder of Steven Warunek, some were "hostile", they "weren't too impressed", and that it was thought to be "a big joke". (R. 40a, 42a). The prosecutors had to raise their voices on occasion to impress upon these people the seriousness of the matter. (R. 40a).

The Petitioner also cites the prosecutor's alleged misconduct toward its two key witnesses, Jack Geisler and Anthony Reynolds, during pre-trial interrogation. However, the record shows that Geisler, during vigorous trial cross-examination by Petitioner's counsel, *explicitly denied being threatened* with the electric chair, although he did admit it was described to him. (R. 404a-405a). Detective Halstead also said it was not intended as a threat to Geisler. (Disq. Tr. 93). Witness Reynolds was questioned *in the presence of his two attorneys* at the time the alleged misconduct was to have taken place. (Disq. Tr. 137, 138). In such context, petitioner's allegation of coercion is neither proved nor presumable.

Petitioner further claims that witness Reynolds, as part of his plea bargain, was promised unusually lenient treatment and infers that the prosecutor would be able to carry out these promises because of a meeting with the Judge. The record, however, is devoid of any testimony that such a meeting took place with the Judge. Further, as the trial judge pointed out in footnote 37 of his Opinion, (Appendix E to the Petition, p. 59a), Geisler plead guilty to 3rd degree murder with the

prosecution recommending a six to fifteen year sentence (out of possible 10-20 years); and Reynolds plead guilty to Voluntary Manslaughter with the prosecution recommending a five to ten year sentence. On its face these are not plea agreements of "unusual leniency". These plea agreements were made to obtain the cooperation and testimony of these individuals. As the trial judge held:

> We find no impropriety in these pleas. Defense counsel exercised his right and elicited the circumstances surrounding these pleas on cross-examination to attack credibility . . . . (Petition, Appendix E, p. 59a, 60a).

These plea agreements, therefore, are not evidence of prosecutorial misconduct.

Petitioner next asserts that Commonwealth witness Geisler received other special considerations such as being released from prison without bond and with the prosecutor signing as his surety, and, never being charged with perjury. Although the procedure utilized to obtain Geisler's release from prison on Friday evening, February 28, 1975 was improper, the motivation for the removal was not improper. The witness became uncommunicative and almost hysterical in the prison. The Warden notified the prison physician and then called the prosecutor. The doctor (Pugliese) gave Geisler an injection and testified that being released from prison would benefit Geisler. At that point, Geisler was taken before a magistrate who then released Geisler upon the prosecutor's signing as surety. (Disq. Tr. 160, 162-164, 171).

That Geisler was never charged with perjury although he admitted to not telling the whole truth in the past is not prosecutorial misconduct. Geisler did not

escape prosecution on any charge. He plead guilty to 3rd degree murder. Prosecuting attorneys have wide power to conduct criminal litigation and to decide whether and when to prosecute or terminate a case.[4] Further, there is no proof that the prosecutor called any witness to testify knowing that such witness would testify falsely. Here defense counsel had possession of the witnesses' prior statements and in the exercise of his right properly attempted to impeach the credibility of witnesses by past inconsistent statements. Again, the defendant's right to a fair trial was preserved, and, there was no prosecutorial misconduct.

Next petitioner claims that the District Attorney's Office wilfully impeded defense counsel's interviews of witnesses by instructing turnkeys not to permit imprisoned witnesses to speak with defense counsel. However, the record in the present case contains no evidence that the district attorney instructed a potential witness not to speak to defense counsel prior to trial. All the district attorney did was tell the turnkeys that he wanted to be present when anyone spoke with witness Richard John Abraham. That he wanted to be present is not prosecutorial misconduct.

Further, there is no evidence in the record that the petitioner's counsel or investigators ever made an attempt to speak with Abraham or any other witness prior to trial. Nor did petitioner file a pre-trial application claiming he was denied access to witnesses. Prior to commencement of the trial, petitioner was given a list of potential witnesses, and, early in the trial, the trial judge directed that he have free access to all witnesses. (Trial

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[4] ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Functions § 3.9.

Tr. 54-5).[5] Richard John Abraham, although available to defense counsel, was not called to testify by either the Commonwealth or the defense. Therefore, the petitioner's allegation that the district attorney wilfully impeded defense access to witnesses is simply unsupported in the record.

Petitioner also claims that the district attorney instructed the police prosecutor not to keep daily records, and, that, inferentially, this impeded the defense of his case. Petitioner does not state how this hindered his case, but, the record shows, however, that Detective Halstead was asked by the district attorney not to make police reports or carry copies of statements back to the police department from the district attorney's office on the grounds that there was fear confidential records were being or would be leaked. (Disq. Tr. 74, 93, Trial Tr. 586-87). It had nothing to do with the defendant; the motivation was simply to preserve the confidentiality of the investigation. (Disq. Tr. 93).

**B. Trial conduct**

The petitioner claims that the prosecutor committed misconduct in opening and closing to the jury, in eliciting evidence of uncharged crimes, and, in cross examining petitioner.

Specifically, petitioner states that in his opening, the prosecutor personally vouched for his witnesses' credibility. While the prosecution did make improper remarks along those lines, nonetheless, the full context of the remarks will show that the prosecutor clearly

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[5] "Trial Tr." refers to the transcipt of the proceedings at trial since the Reproduced Record does not contain all matters that transpired in this case.

stated that what *he* believed was not evidence in the case, that it was for the jury to weigh and consider the testimony, and, it was for the jury to determine whether or not to believe a witness. (R. 326 A). The remarks in context, therefore, were not so strong or abusive that they incited prejudice in the eyes of the jurors. Furthermore, petitioner's counsel failed to timely object to the remarks. He failed to object when they were made as required by Pennsylvania law;[6] rather, he waited until after he had completed his own opening address, during which he vouched for the truthfulness of his witness, the petitioner herein. (Trial Tr. 20, 21). He even went further and called the Commonwealth's witnesses "liars" even though they hadn't yet testified. (Trial Tr. 21). In this context, the prejudicial effect of the Commonwealth's remarks was minimal, if any.

The petitioner next asserts that the prosecutor elicited evidence from Commonwealth witnesses that Cohen was engaged in illegal drug supplying, a crime with which he had never been charged. The prosecutor is also accused of cross-examining petitioner Cohen as to the illegal drug use and his failure to support an illegitimate child. While it is true that the prosecutor asked Commonwealth witnesses about petitioner's involvement of drugs, nonetheless such questions were not prosecutorial misconduct for these were proper to establish the motive and the manner in which Cohen sought to rid himself of the victim, Warunek. Furthermore, Cohen's able trial counsel failed to make any objections to these questions nor were cautionary instructions re-

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[6] Pennsylvania Rule of Criminal Procedure 1118(b) states:

> when an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

quested. In addition, it was Cohen's trial counsel who first made reference to Cohen's drug use when he stated in his opening address to the jury:

> "You'll find that he was and did use drugs in the past. Richard has used drugs." (Trial Tr. 22).

Finally when petitioner took the stand in his defense he readily and repeatedly admitted on direct examination his involvement with drugs, as it pertained to the Warunek murder. (Trial Tr. 590, 593-6, 598, 602-3).

As for the petitioner's failure to support his illegitimate child, again, it was not the Commonwealth that "opened the door", but, rather, it was Cohen's counsel, who, during the testimony of Commonwealth witness, Kerry Young, stipulated that Cohen was the father of Kerry's child (Trial Tr. 81); and in cross-examining her, petitioner's counsel brought up the subject of support for the child when he asked her about Cohen's paying the hospital bills. (Trial Tr. 85). Further, when petitioner Cohen took the stand, he testified on direct that he tried to get money to pay for her hospital bills. (Trial Tr. 591). None of these remarks, therefore, could be labeled prosecutorial misconduct but rather defense trial strategy.

Petitioner makes numerous claims of misconduct as a result of the assistant district attorney's closing speech. But the record shows that petitioner's trial counsel failed to make any objection either during the closing or at the end of it as to those statements which he now claims denied him a fair trial. The Pennsylvania Supreme Court has consistently held that allegatons of basic and fundamental error must be raised in timely and proper fashion or else they are *deemed waived*, and, not considered on appeal. *Commonwealth* v. *Clair*, 458 Pa. 418, 326 A.2d 272, 274 (1974). See also Pa. Rule of

Criminal Procedure, 1118(b), *supra*. In any event, the unobjected to closing remarks of the prosecutor petitioner now claims are egregious prosecutorial misconduct, when viewed in full context, are not prosecutorial overreaching. For example, the prosecutor is accused of expressing his personal belief that Cohen was guilty. (R. 498a). However, the prosecutor never said those words; what he did say was the Cohen was "an accomplice in murder," and, "if it's not first degree murder, I don't know what it is." (R. 498a). Both these statements were nothing more than restatements of the charges in the indictment, and, the prosecutor carefully pointed out to the jury that the trial judge would define and explain the charges "so that you can thereby logically conclude the evidence supports the conclusion he was an accomplice." (R. 498a). Perhaps the phraseology of the prosecutor was not the best, but, it was not intentional or grossly negligent error.

## II. Neither The Due Process Nor The Double Jeopardy Clauses Warrant Dismissal Of The Charges.

### A. No due process violation

The Pennsylvania Supreme Court ordered petitioner's third degree murder and conspiracy convictions reversed and granted him a new trial on the grounds that the trial court erred in not granting petitioner's request for a change of venue. However, the Court refused to accept petitioner's claim "that the alleged prosecutorial misconduct here forecloses retrial or a theory that due process has been denied." (Petition, Appendix B, p. 10a).

Petitioner had argued to that Court, as he does here, that Commnowealth witnesses could never be un-

coerced, that it is too much to believe that they could ever be free of the alleged prosecutorial misconduct and their own prior tainted testimony. The Supreme Court of Pennsylvania rejected that argument.

This Honorable Court should also reject petitioner's argument and deny the Writ.

First of all, the alleged coercion of the Commonwealth witnesses is vigorously disputed by the record as was pointed out earlier in this brief. Even the trial judge, who heard the testimony on the alleged coercion, noted in his Opinion:

> A review of the testimony at the pre-trial hearing demonstrates that these allegations were either not established under the evidence, derived from conversations taken from incomplete context, or subject to dispute. (Petition, Appendix E. p. 34a).

Secondly, petitioner was protected from any possible injustice by being aware of how the cooperation of the Commonwealth's witnesses was obtained, what their prior statements were, and being able to cross examine each witness in detail on those matters.

Thirdly, the prosecutor's alleged misconduct was the central defense strategy at trial, and, much of the now objected to words and conduct went consistently unobjected to at trial. How can this conduct be so offensive on appeal but acceptable to the petitioner during the course of the trial?

Fourth, the Pennsylvania Supreme Court has held a new trial would be "sufficient remedy for the asserted prosecutorial misconduct." (Petition, Appendix B, p. 10a). Venue will be in Lackawanna County, Pennsylvania; a special prosecutor has been appointed, and the former prosecutor, whose personal involvement and

conduct itself became a major issue at trial, will not be associated with the case.[7]

Fifth, implicit is petitioner's claim that the witnesses cannot now be uncoerced is the assumption that a new jury, which would see and hear the witnesses, which would observe the examination and cross-examination of the witnesses, could not fairly evaluate the credibility of the witnesses and fairly weigh their testimony. Petitioner's argument further assumes that a Court, not having the same opportunity as jury to observe and listen, and, viewing only a cold record, which shows many of his misconduct allegations unsupported or disputed, that such a Court should as a matter of law declare that the witnesses cannot now be uncoerced. The Commonwealth urges this Honorable Court to reject such a notion. As the Pennsylvania Supreme Court held:

> Appellant's (Petitioner's) claim mistakenly rests on an unsupportable assumption that a fair trial cannot be had in the future. (Petition, Appendix B, p. 10a).

### B. Decision below not in conflict with decision in other jurisdictions

Petitioner asserts that the ruling of the Pennsylvania Supreme Court "conflicts with decisions in numerous other jurisdictions, including the Federal Appellate court which sits in Pennsylvania. . . ." (Petition, p. 13). The Commonwealth disputes this assertion. First cited as an example of such supposed conflict is *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979). The

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[7] The Acting Attorney General of Pennsylvania, Harvey Bartle III, on June 23, 1980 appointed the District Attorney of Lackawanna County, Ernest D. Preate, Jr., to be a Special Assistant Attorney General for the prosecution of the instant case.

Commonwealth submits that *Morrison* is inapposite to the facts of the instant case. In *Morrison* a three judge panel held that Hazel Morrison's constitutional right to counsel was improperly intruded upon by actions of drug enforcement agency agents when they contacted her out of her counsel's presence, attacked the dedication and competency of her counsel, and attempted to raise doubts in her mind about his effectiveness. Further, since no other relief was available — there being no evidence to suppress or trial to re-try — the Court ordered the indictments dismissed. While it should be noted that the panel's decision in *Morrison* has been severely criticized by at least two other circuit judges, nonetheless, we do not have in Petitioner's case a direct invasion of his right to counsel, nor is there an absence of a sufficient remedy, i.e. re-trial is available here.

Petitioner also cites *United States* v. *McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975), as being in conflict with the Pennsylvania Supreme Court's decision. In *McCord*, the defendant claims that the prosecution knowingly used perjured testimony against him and engaged in a concented effort to coerce him to plead guilty and to remain silent as to the involvement of high government officials in the authorization of the Watergate breakin. *U.S.* v. *McCord*, *supra*, at 340, 349. Instantly, there is no evidence in the record of such alleged prosecutorial misconduct as charged in *McCord*. Further, in *McCord*, his bid to dismiss the charges was denied, and, his conviction was upheld.

Petitioner also cites *United States* v. *Butler*, 567 F.2d 885 (9th Cir. 1978). In *Butler*, a new trial was ordered when the Court concluded that prosecution concealed the true nature of its dealings with its key

witness, and, knowingly permitted false testimony. This decision is not in conflict with the Pennsylvania Supreme Court's decision not only because there is no claim of such misconduct in petitioner's case, but also because re-trial was deemed a sufficient remedy in *Butler*.

Lastly, petitioner cites *United States* v. *Banks*, 383 F. Supp. 389 (D.S.D. 1974), appealed dismissed sub nom., *United States* v. *Means*, 513 F.2d 1329 (8th Cir. 1975). There the Court held double jeopardy prevented reprosecution where the prosecutors:

> 1) refused to accept a verdict of 11 jurors after an 8-1/2 month trial; 2) failed to furnish the defense with a prior and completely contradictory statements of its key witness; 3) deceived the Court with regard to a serious crime allegedly committed by one of its key witnesses; 4) failed to correct the obvious false testimony of a key witness.

A review of the record in the instant case clearly demonstrates that there was no mistrial situation below which the prosecutors took advantage of, nor were there any attempts to hide prior statements or activities of its witnesses, nor was the Court deceived, nor was false testimony knowingly permitted.

In summary, the Commonwealth submits that, once again, upon close examination of Petitioner's claim, it is not supported by the authority he cites.

### C. No double jeopardy violation

Lastly, Petitioner asserts a double jeopardy violation, i.e., prosecutorial bad faith or harassment of a defendant can bar re-prosecution. He argues that the case at bar presents this Court with the occasion to define the scope of that rule, or, identify the kinds of conduct that fall within it. (Petition, p. 14, 15) The

Commonwealth contends that neither the facts of the case nor the relevant law demand this Court's granting of the Petition.

This Honorable Court has held that the Double Jeopardy Clause will bar a retrial if the defendant sought the mistrial as a result of prosecutorial misconduct amounting to "overreaching." *Lee* v. *United States*, 432 U.S. 23, 32 (1977). This court has enunciated principally two types of prosecutorial overreaching. First, there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps, more favorable, opportunity to convict the defendant. *Downum* v. *United States*, 372 U.S. 734 (1963). Second, there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. *Lee* v. *United States*, *supra* at 33.

Instantly, as the Pennsylvania Supreme Court held, there is no prosecutorial misconduct here which forced the defendant to timely request a mistrial. (Petition, Appendix B. pp. 10a, 11a). Indeed, the Court held that Cohen "points to nothing on this record establishing that he made a timely request for a mistrial," (Id., at 11a), which calls into question the sincerity of his discovery on appeal of prosecutorial trial misconduct. Additionally, there is nothing in the record which establishes that the prosecutor sought to provoke a mistrial in order to secure a second more favorable opportunity to convict. Lastly, as a review of the evidence earlier in this Brief suggested, there was no prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. The errors that did occur, while not to be condoned, warranted the granting of a new

trial, but do not constitute overreaching. As this Court has declared:

> The defendant's double jeopardy interests, however defined, do not go as far as to compel society to mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. *United Sates* v. *Jorn*, 400 U.S. 470, 484 (1971).

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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